Nos. 90-408, 90-577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF YAKIMA AND DALE A. GRAY,
Yakima County Treasurer,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Cross-Petitioner,

v.

COUNTY OF YAKIMA AND DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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QUESTION PRESENTED

Whether Section 6 of the General Allotment Act authorizes taxation by States and local governments of fee patented land owned by tribal Indians and Indian tribes.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a manifest interest in legal issues that affect state and local governments, such as issues concerning state and local government taxing authority.

This case raises questions concerning the authority of States and local governments to tax fee patented land on reservations that is owned by tribal Indians and Indian tribes. States and local governments have taxed these lands for years pursuant to the congressional authority conferred by the General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.* The court of appeals correctly held that Section 6 of the Act grants States and local governments express authority to tax such fee patented land, although it incorrectly held that this general authority could be implicitly and sporadically revoked by the courts as the result of case-by-case analysis of the impact of taxation on tribal interests. Because of the importance of these issues of taxing authority to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Amici adopt the statement of the case of petitioners/cross-respondents.

SUMMARY OF ARGUMENT

Because the federal government is vested with plenary authority over Indian affairs, Congress can authorize the imposition of state and local taxes on Indians. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). The test is whether Congress has "'manifested a clear

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

purpose'" to allow a state or local tax. *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976) (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)).

The ad valorem tax imposed by Yakima County on fee patented lands on the Yakima Reservation is authorized by Section 6 of the General Allotment Act. *See* 25 U.S.C. § 349. Section 6 expressly provides that once the federal government has issued a patent in fee simple for reservation land to a tribal Indian, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The Court, in decisions spanning most of this century, has construed Section 6 to authorize States to tax fee patented land. *See Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956); *Goudy v. Meath*, 203 U.S. 146, 149-50 (1906).

The incessant fluctuation in federal Indian policy has no bearing on this conclusion. The authorization of the General Allotment Act for state and local government taxation of fee patented land remains in full force and effect to this day—evolution of general policy and enactment of subsequent statutory schemes notwithstanding. It is axiomatic that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Neither does *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), alter the outcome of this case. *Moe* assessed the validity of state taxation of cigarette sales and personal property, not taxes on fee patented land. The State sought to justify that taxation as authorized by the first, more general clause of Section 6. In *Moe*, the Court declined to adopt the State's reading of the first clause of Section 6 as applied to the taxes at issue in that case. However, the Court did not reach the statutory language at the heart of this case, nor did it discuss taxes on land. Moreover, the concerns that caused

the Court to be critical of "checkerboard jurisdiction" in *Moe* are unwarranted here.

While the court of appeals correctly concluded that Section 6 authorizes Yakima County's ad valorem tax on fee patented land, it erred insofar as it held that the validity of that tax as applied to those lands is nevertheless to be determined by application of the analysis of *Brendale v. Confederated Tribes of Bands of the Yakima Nation*, 492 U.S. 408 (1989). *See* Pet. App. 27a-28a. The Court has squarely held that in taxation cases "it is unnecessary to rebalance . . . in every case" the State's interest in taxation and the Indians' interest in tax immunity. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987).

ARGUMENT

I. CONGRESS HAS MANIFESTED A CLEAR PURPOSE OF ALLOWING STATES AND LOCAL GOVERNMENTS TO LEVY TAXES ON FEE PATENTED LANDS

A. Section 6 of the General Allotment Act Expressly Authorizes the Imposition of State and Local Taxes on Fee Patented Lands

The Constitution vests the federal government with exclusive authority over relations with Indian tribes. U.S. Const. Art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1984); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); F. Cohen, *Handbook of Federal Indian Law*, 270-72 (1982 ed.). "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory." *Montana v. Blackfeet Tribe*, 471 U.S. at 764.

"In keeping with its plenary authority over Indian affairs," however, "Congress can authorize the imposition

of state taxes on Indian tribes and individual Indians." *Id.* at 765. *See also McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973). Accordingly, "statutory authorization for states to tax reservation Indians will be found . . . where 'Congress has manifested a clear purpose' to allow a tax." F. Cohen, *supra*, at 407 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)). *See also Montana v. Blackfeet Tribe*, 471 U.S. at 765 (congressional authorization to tax must be unmistakably clear); Pet. App. 10a-12a (collecting cases).

Amici respectfully submit that Section 6 of the General Allotment Act,[2] 25 U.S.C. § 349, contains a clear and unmistakable expression of congressional intent to authorize States and local governments to tax fee patented land on reservations owned by tribal Indians and Indian tribes. In unambiguous language, Section 6 provides that land allotted to Indians and Indian tribes pursuant to the provisions of the Act shall be subject to taxation after the expiration of the trust period prescribed by the Act.

The first clause of Section 6 provides a broad grant of authority to the States. The clause states:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

25 U.S.C. § 349. A 1906 "proviso"[3] to the General Allotment Act further states:

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[2] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 *et seq.*).

[3] Where, as here, a "proviso" contains broad and explicit language, and the context indicates that it was not intended "merely to safeguard against misinterpretation or to distinguish different para-

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, *and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed* . . . .

Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified as amended at 25 U.S.C. § 349) (emphasis added).

These two parts of Section 6 provide clear authorization to States and local governments to tax allotted lands that have been patented in fee pursuant to the Act. Furthermore, the legislative history of these provisions, as well as the administrative interpretation given to them over the years, support the same conclusion. *E.g.*, 13 Cong. Rec. 3211 (1882) (Sen. Dawes); 19 Op. Atty. Gen. 161, 169 (1888); 53 L.D. 107 (1930). In short, Congress has "manifested a clear purpose" to allow state taxation of lands owned in fee by Indians. *See Bryan v. Itasca County*, 426 U.S. at 392.

Given the clarity of the statutory language, it is not surprising that the Court has adopted and reaffirmed this reading of Section 6. In *Goudy v. Meath*, 203 U.S. 146 (1906), the Court construed Section 6 and the same treaty language as applies here and concluded, even without reference to the 1906 proviso, that States are authorized to levy real estate taxes on fee patented land owned by Indians. *Id.* at 149-50. In *Squire v. Capoeman*, 351 U.S. 1 (1956), the Court focused on the language of the 1906 proviso. It concluded that

> [t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes . . . after a patent in fee is issued to the

graphs or sentences," it will "apply generally to all cases within the meaning of the language used." *McDonald v. United States*, 279 U.S. 12, 21-22 (1929). Such a reading is particularly appropriate where the proviso was added by a subsequent amendment.

> allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

Id. at 7-8. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), Justice Murphy made the unchallenged statement that lands allotted to Indians were exempt from state taxation under Section 6, but only while the trust restrictions continued. *Id.* at 618-19 (Murphy, J., with Stone, C.J., Reed & Frankfurter, JJ., dissenting in part).

In view of the clarity of the statutory language and this Court's consistent constructions of that language across a period of eighty-five years, there is no tenable basis for the argument that Section 6 does not authorize Yakima County's ad valorem tax on fee patented lands. As the court of appeals persuasively reasoned:

> The Court's construction in *Capoeman* of the statute independently reinforces the interpretation given to it in *Goudy*: the State may not tax while the land is held in trust or restriction, but is free to tax *after* the land had been patented in fee.

Pet. App. 14a. The court of appeals thus correctly held that "the unambiguous statutory language contained in 25 U.S.C. § 349, and the interpretation given to it in *Goudy* and *Capoeman*, manifest Congress's clear intention to permit the states to tax fee patented land owned by Indian tribes or their members." *Id.*

B. The Validity of Section 6 is Unaffected by Subsequent Developments

Since the late nineteenth century, federal Indian policy has been subject to incessant fluctuation. The General Allotment Act aimed to foster assimilation of Indians into society at large because it was believed that assimilation was in the Indians' best interests. *See* W. Canby, *Amer-*

ican Indian Law 19 (2d ed. 1988) ("There is little question that the leadership for passage of the [General Allotment] Act came from those sympathetic to the Indians."); D. Otis, *History of the Allotment Policy* (1934), *quoted in* D. Getches & C. Wilkinson, *Federal Indian Law* 112 (2d ed. 1986) ("That the leading proponents of allotment were inspired by the highest motives seems conclusively true.").

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-92 ("IRA"), subsequently substituted a policy of Indian autonomy for the policy of assimilation. *See* W. Canby, *supra*, at 23-25. This policy, in its turn, was criticized by both Indians and the Congress. *See* D. Getches & C. Wilkinson, *supra*, at 128-30. By the late 1940's, assimilation again had become the goal of federal Indian policy. "In 1949 the Hoover Commission recommended an about-face in federal policy: 'complete integration' of Indians should be the goal so that Indians would move 'into the mass of the population as full, taxpaying citizens.'" *Id.* at 130. By the early 1950's, Congress's "express aim" was "'as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.'" W. Canby, *supra*, at 25 (quoting H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953)). *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 n.32 (1980).[4]

[4] In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, the Court explained that the policy of assimilation:

> was formally announced in H.R. Con. Res. 108, 67 Stat. B132, approved on July 27, 1953, the same day that Pub. L. 280 was passed by the House. 90 Cong. Rec. 9968 (1953). As stated in H.R. Con. Res. 108, the policy of Congress was "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . ." This policy reflected a return to the philosophy of the General Allotment Act of 1887, ch. 199, § 1, 24 Stat. 388, as amended, 25 U.S.C. § 331, popularly known as the Dawes Act, a philosophy which had been rejected with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984.

439 U.S. at 488 n.32.

In the late 1960's assimilation again fell out of fashion and was replaced by the policy of tribal self-determination. *See* W. Canby, *supra*, at 28-31; D. Getches & C. Wilkinson, *supra*, at 151-54.

Given these full swings in federal Indian policy, the enactment of the IRA in 1934—while it may, for a time, have reflected a "repudiation" of prior policy, *see Moe*, 425 U.S. at 479—cannot sustain the conclusion that the General Allotment Act was invalidated by the passage of the IRA. On the contrary, lands allotted pursuant to the General Allotment Act from 1887 to 1934, such as the lands at issue in this case, remain subject to the detailed provisions of that Act. In fact, the IRA necessarily took account of the continuing legal effect of the Allotment Act by extending the trust period for previously allotted lands. *See* 25 U.S.C. § 462. Other sections of the IRA also take into account the continuing legal validity of the General Allotment Act.[5]

This Court, too, has repeatedly recognized that the legal status of fee patented land conveyed to Indians pursuant to the General Allotment Act was not altered by the IRA. *See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Hodel v. Irving*, 481 U.S. 704 (1987); *Montana v. United States*, 450 U.S. 544

[5] Section 465, for example, authorizes the Secretary of the Interior to acquire lands, including allotted lands, for the Indians. It provides that these lands, once acquired, "shall be exempt from state and local taxation." 25 U.S.C. § 465. This affirmative grant of tax-exempt status to certain lands acquired for the Indians reflects the recognition by Congress that other lands held in fee are taxable by States and local governments under the General Allotment Act.

(1981). In *Hodel*, for example, the Court noted that while the IRA ended future allotment, it did not alter the legal status of land already allotted.[6] *See* 481 U.S. at 708-09. And in *Brendale* the Court rejected an argument by the Yakima Nation that is essentially identical to the one that it makes in this case: that after the IRA courts should analyze the legal status of allotted and fee patented land as if allotment had never occurred. As Justice White's plurality opinion explained in rejecting this argument in *Brendale*:

> The Yakima Nation argues that we should not consider the Allotment Act because it was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984. But the Court in *Montana* was well aware of the change in Indian policy engendered by the Indian Reorganization Act and concluded that this fact was irrelevant. Although the Indian Reorganization Act may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians.

Brendale, 492 U.S. at 423 (citations omitted). *See also Montana v. United States*, 450 U.S. at 560 n.9 (ending policy of allotment did not alter "the effect of the land alienation occasioned by that policy"). Just as the IRA did not change the legal status of fee patented lands by preventing them from passing to non-Indians, it did not restore the tax exempt status of those lands.

As a matter of well-settled law, moreover, a change in policy, even if it results in a new statute expressing the policy, does not implicitly repeal prior acts of Congress

[6] At issue in *Hodel* were problems created when allotted lands were divided into small and virtually worthless lots. Congress acted in 1983 to ameliorate the problem of fractioned ownership of Indian lands. *See* Indian Land Consolidation Act, Pub. L. 97-459, Tit. II, 96 Stat. 2519 (1983).

dealing with the same subject but influenced by the more dated policy. As the Court explained in *Morton v. Mancari*:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest'."

417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). *See also Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 510 (1989); *Watt v. Alaska*, 451 U.S. 259, 267 (1981).[7]

There has never been any indication that Congress repealed or intended to repeal Section 6 of the General Allotment Act.[8] Given that fact, Congress's presumed knowledge of the consistent application of Section 6, and the peaceful coexistence of Section 6 and subsequent Indian legislation, the detailed provisions of the General Al-

[7] It is true that these settled principles of statutory construction may not have their usual force in an Indian law case. *See Montana v. Blackfeet Tribe*, 471 U.S. at 766. Nonetheless, the requirement that the Court construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *id.*, is not relevant where, as here, the statutes are unambiguous. The General Allotment Act expressly authorizes taxation of Indian-owned, fee-patented land; the IRA contains no language, ambiguous or otherwise, that repeals this authorization. The canon of construction requiring ambiguities to be resolved in favor of the Indians "is not a license to disregard clear expressions of . . . congressional intent." *Rice v. Rehner*, 463 U.S. 713, 733 (1983).

[8] The Act was the subject of technical amendments as recently as 1987. *See* Pub. L. 100-153, 101 Stat. 886 (1987), codified at 25 U.S.C. § 373.

lotment Act respecting previously allotted lands are in full force today.[9]

C. The County's Authority to Tax Fee Patented Lands Is Unaffected by *Moe*.

The Yakima Nation contends that *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), takes away Yakima County's authority to tax fee patented land owned by Indians. A careful reading indicates that *Moe* is not at odds with the congressional decision, embodied in Section 6, to authorize taxation of these lands. Furthermore, *Moe* does not establish a per se rule against "checkerboard jurisdiction." In short, the court of appeals correctly concluded that "*Moe* did not rule upon the applicability of section 6 to state taxation of fee patented land." Pet. App. 18a. Several aspects of the *Moe* decision support this conclusion.

Moe involved taxation of cigarette sales and the ownership of personal property, rather than taxation of land. In rejecting the State's claim in that case, the Court ruled that language in the first clause of Section 6 (providing that "every allottee shall . . . be subject to the laws, both civil and criminal, of the State") was insufficient to authorize the state taxation at issue. 425 U.S. at 477-78. The Court did not consider, however, the language added by the 1906 proviso, which states that "all restrictions as to . . . taxation of said land shall be removed." 25 U.S.C. § 349. Nor did the Court discuss its

[9] In a recent and analogous situation, the Court addressed the effect of the IRA on the authority of States to impose taxes on the activities of nonmembers on reservations. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court refused to invalidate a tax on the basis of an asserted general shift in congressional policy toward maximizing returns to Indians from natural resources. In passing, the Court similarly refused to preempt state taxation due to the general "congressional concern with fostering tribal self-government and economical development" found in the IRA. *Id.* at 193 n.14.

previous decision in *Squire*, in which it ruled that this additional language refers to the taxation of fee patented land and "envinces a Congressional intent to subject an Indian allotment to all taxes . . . after a patent in fee is issued to the allottee." 351 U.S. at 8.

The proposition for which the State argued in *Moe* is different from the proposition for which we argue. In *Moe*, the State argued that all tribe members on a reservation are subject to cigarette sales tax and personal property tax because tribe members whose land had been patented in fee under Section 6 of the Allotment Act remained "'subject to the laws, both civil and criminal, of the State or Territory in which they may reside.'" *Moe*, 425 U.S. at 477 (quoting 25 U.S.C. § 349). The Court characterized this argument as "untenable" because "[b]y its terms § 6 does not reach Indians residing or producing income from lands held in trust for the Tribe." *Id.* at 478.[10]

There was no way, the Court recognized, to accept the State's position in *Moe* as to taxation without finding that Indians living on fee patented land were, as the clause of Section 6 addressed in *Moe* would have it, subject to all state jurisdiction—civil and criminal. As *Moe*'s discussion of *Seymour v. Superintendent*, 368 U.S. 351 (1962), made clear, however, this simply was not the law. *Seymour* had held that a State could not exercise criminal jurisdiction merely because an offense occurred on fee patented land. *Id.* at 358. The consequence of adopting the State's argument in *Moe* would have been either to subject all Indians to state taxation because some Indians held fee patented land or else—more narrowly, but just as troubling—to allow indiscriminate ex-

[10] There is no indication that any party in *Moe* even held fee patented land so as to come within the terms of Section 6. The cigarette retailer whose sales the State sought to tax operated his shops on trust lands. *See* 425 U.S. at 467.

ercise of all state jurisdiction, civil and criminal, over those Indians holding such lands.

Our position is far different. We do not ask the Court to find that Section 6 authorizes the State to exercise all forms of jurisdiction over fee patented land or the tribal members who own it. Rather, we contend that Section 6 authorizes States and local governments to tax fee patented land.

Given the issues presented in *Moe*, that case sheds no light on whether Section 6 continues to authorize taxation of fee patented land. *Moe* merely ruled that the general "subject to" language of the first clause of Section 6 and the *Goudy* decision construing that language were inapplicable to the taxation of cigarette sales and personal property ownership. *See Duro v. Reina*, 110 S. Ct. 2053, 2060 (1990) (*Moe* held that States "may not impose certain taxes on transactions of tribal members on the reservation."). *Moe* did not state that *Goudy* was no longer good law, nor did it construe the 1906 proviso to Section 6. The Yakima Nation's reliance on *Moe* in this case is therefore misplaced.

Moe does indicate that checkerboard jurisdiction is a pertinent consideration in some cases. *See* 425 U.S. at 478 (citing *Seymour v. Superintendent*). Checkerboard jurisdiction is not a source of concern in this case, however. The ad valorem taxation of individual parcels of land is an inherently "checkerboard," case-by-case process.

Seymour involved a habeas petition by an Indian charged in state court with the commission of a burglary on an Indian reservation. Jurisdiction over the offense was in dispute because of multiple and overlapping statutes and treaties. A federal criminal statute, 18 U.S.C. § 1151, explicitly defined "Indian Country" to contain "all land within the limits of any Indian reservation under the jurisdiction of the United States Government,

notwithstanding the issuance of any patent." 368 U.S. at 353.

Based on Section 1151, the Court rejected the State's assertion of criminal jurisdiction. In so holding the Court emphasized the practical and logistical problems that might otherwise result:

> Where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

368 U.S. at 358 (footnote omitted).

In *Moe*, the Court analyzed the State's claim of authority to tax cigarette sales and personal property and noted that a similar, sweeping argument had been made by the State in *Seymour*. 425 U.S. at 478. Citing the language quoted above, the *Moe* Court held that "[s]uch an impractical pattern of checkerboard jurisdiction" was contrary to the intent of Congress. *Id.*

Seymour and *Moe* do not stand for the proposition that "checkerboard" jurisdiction is invalid under all circumstances. In fact, the Court has expressly held that checkerboard jurisdiction is permissible. In *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, the Court held that "checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution." 439 U.S. at 502. Discussing the impact of

Public Law 280 on the jurisdictional framework affecting reservations, the Court noted that:

> The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction.

Id. The *Washington* decision thus establishes that checkerboard jurisdiction is lawful. *Cf. Brendale*, 492 U.S. at 430 (plurality opinion of White, J.). Consequently, legislation may give rise to such a scheme in appropriate situations.

Moe and *Seymour* support this conclusion. They simply hold that in certain cases checkerboard patterns of jurisdiction were invalid as contrary to the intent of Congress. *Moe* concluded that practical difficulties inherent in a checkerboard approach to taxing cigarette sales and personal property make that approach impractical and unwarranted under the general "subject to" language of Section 6. *See* 425 U.S. at 478-79. *Seymour* concluded that the plain language of Section 1151 militated against the absurd and impractical result of requiring law enforcement officers to search tract books prior to every arrest. *See* 368 U.S. at 358.

These cases hold that if a checkerboard pattern of jurisdiction creates impractical results that are contrary to statutes passed by Congress, then the scheme is invalid. This is not the case here, however. Property tax assessment necessarily requires resort to the tract books; variations by plot are inevitable. Nor is such taxation contrary to Congressional intent. As we have shown, Congress has expressly consented to state and county taxation of fee patented lands.[11]

[11] The court of appeals also correctly concluded that 18 U.S.C. § 1151 does not affect the outcome of this case. *See* Pet. App. 24a-25a. While this Court has recognized that the definition of "Indian country" in § 1151 may apply to civil questions, *see DeCoteau v. District Cty. Court*, 420 U.S. 425, 427 n.2 (1975), the court of appeals' conclusion is not to the contrary.

The court of appeals did not hold that fee patented land, which is part of § 1151's definition of "Indian country" for purposes of criminal jurisdiction, is outside "Indian country" for purposes of civil jurisdiction. Rather, the court correctly concluded that § 1151 and the problems of checkerboard criminal jurisdiction it is designed to address are inapplicable to the narrow taxation question presented in this case. *See* Pet. App. 24a-27a. *See also* discussion *supra* at 14-16. Indeed, as this Court recognized in *DeCoteau*, even "within 'Indian country' a State may have jurisdiction over some persons or types of conduct," although as has long been recognized this jurisdiction is "quite limited." 420 U.S. at 427 n.2. We submit, for the reasons discussed above, that the taxation of fee patented lands is a valid exercise of the States' jurisdiction.

In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), this Court rejected a similar attempt to use law applicable to Indian criminal matters to invalidate a state tax on Indians. The criminal statute at issue in that case, 18 U.S.C. § 1153, lists the crimes over which the federal government exercises jurisdiction in Indian country as defined in § 1151. It thus prevents the States from imposing their criminal laws for such crimes on Indians residing on reservations but not enrolled in the governing tribe. The Court, however, rejected the argument that § 1153, "even given the broadest reading to which [it is] reasonably susceptible," prevented the State from imposing its sales and cigarette taxes on Indians residing on the reservation but not enrolled in the governing tribe. *See id.* at 161-62.

II. THE COURT OF APPEALS ERRED IN APPLYING THE ANALYSIS OF *BRENDALE* TO THIS TAX CASE

The court of appeals correctly concluded that States and local governments are authorized by Section 6 to impose taxes on fee patented lands. It erred, however, insofar as it concluded that the analysis of the plurality of the Court in *Brendale v. Confederated Tribes*, *supra*, requires a further, case-by-case balancing of the impact of such taxation on tribal interests. *See* Pet. App. 27a-28a (citing *Brendale*, 109 S. Ct. at 3008 (plurality opinion of White, J.)).

The Ninth Circuit's application to this tax case of *Brendale*-type balancing of state and tribal interests is

incorrect because "[i]n the special area of state taxation of Indian tribes and tribal members, [this Court has] adopted a per se rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). State taxation is distinguished in this regard from other assertions of state jurisdiction. *See id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). "Accordingly, it is unnecessary to rebalance . . . in every case" the State's interest in taxation and the Indians' interest in tax immunity. *Id.* Rather, once "congressional consent" to the tax has been established, no further inquiry is warranted. *See id.*

Consistent with the foregoing, the Court has held that equitable considerations are not relevant in determining the validity of a tax directly affecting Indians. Discussing the imposition of taxes on non-Indian customers of Indian retailers operating on a reservation, the Court has stated that "[s]uch a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

Justice Rehnquist wrote separately in *Colville* to emphasize concerns that are directly relevant here. "Since early in the last century," he wrote,

> this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. . . . I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.

447 U.S. at 176-77 (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part) (footnote omitted).

The appropriate test thus is not whether the tax consented to by Congress will have an adverse effect on Indians. Rather, the sole inquiry in determining whether Yakima County has taxing authority over fee patented lands owned by Indians is whether Congress intended to permit such taxation. As is demonstrated above, Congress has clearly manifested that intent.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as the court held that States and local governments have authority to tax fee patented lands owned by tribal Indians and Indian tribes on reservations, and otherwise should be reversed.

Respectfully submitted,

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